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CRIMINAL RESPONSIBILITY OF SOVEREIGNS FOR WILLFUL VIOLATIONS OF THE LAWS OF WAR.

THE question suggested by this title is now presented in concrete form on the effort made by the allied nations to procure the surrender by Holland of the late German Emperor, with a view to trying him under the Treaty of Peace concluded between them and Germany.

It would be presumptuous in the writer to claim sufficient knowledge of history to deal fully and adequately with this interesting subject. Nor could this be done within the proper limits of an article in a legal periodical. I venture to hope, however, that it may be possible to say something to clarify the subject in the minds of the profession by calling attention to some principles relevant to this inquiry, possibly to some precedents, where questions related to this general theme have arisen and been discussed and decided.

The matter was brought to the notice of the profession in an address by Mr. Lansing, our accomplished former Secretary of State, delivered before the American Bar Association at its meeting in Boston last September. It was my good fortune to hear that address and I have since read and re-read a number of times so much of it as is devoted to an account of the conclusions reached at Paris by the Peace Conference and the attitude taken by the American representatives on the Commission on Responsibilities, over which the Secretary tells us he presided. Our other American representative was Dr. James Brown Scott, Secretary of the Carnegie Endowment for International Peace.

I am not altogether certain that I understand clearly the principles upon which these gentlemen proceeded in this matter, nor exactly what their grounds for objecting to bringing the imperial offender to trial are.

These would seem to be based in a measure upon the great opinion of John Marshall in Schooner Exchange *v.* M'Faddon,[1]

[1] 7 Cranch 116.

recognized in all civilized nations as placing upon a sound and enduring basis the familiar rule of international comity by which a sovereign within a foreign country, and his ambassadors as well, may claim exemption from the operation of its laws and judicial process for their enforcement. When that case and its facts are examined, its citation in this connection appears so singular that we must certainly feel some doubt whether we have not somewhat misapprehended the reasoning of the learned Secretary.

Before dealing with the subject in detail it may be proper first, so far as possible, to clear up some preliminaries.

In a sense it may be said that there is no such thing as criminal, nor, for that matter, civil, responsibility of a sovereign state. The dictum of Burke—"I do not know the method of drawing up an indictment against a whole people"—has some foundation in law and international usage. No original writ has ever been framed, no form of indictment so far as I know exists, for proceeding either civilly or criminally against a nation, nor is there any tribunal to whose jurisdiction such a proceeding appertains. I disregard in this connection statutory provisions pertaining to municipal law.

Indemnities and reparations as between nations are matters for the exercise of political and not judicial power, and rather for negotiations and, in form at least, convention. Thus the Prussian or German Government exacted of France a war indemnity; but this was done by treaty and not by judicial decree. And although this treaty may have been dictated by superior force and the sword of the conqueror, on the cruel maxim, *vae victis esse,* nevertheless this indemnity, as well as the Alsace-Lorraine cession, was the result of negotiation and in form an international pact.

A distinction exists between an individual sovereign and a sovereign state in this respect. This is demonstrated in that the late treaty made by Germany contemplates the surrender and trial of its former sovereign. True, he is no longer sovereign *de facto* at least. But if the king can do no wrong, neither could he, as emperor, and hence he is not triable for what he did in

his sovereign capacity. The truth is that internationally this is a question of agency.

I agree that it would be folly to contend that an irresponsible sovereign like the German Emperor, having full constitutional authority to declare a defensive war and having declared this to be such, could be tried because of this essentially sovereign act or on the charge that in the prosecution of such a war he disregarded treaty rights. These acts are imputed to the sovereign state. But my thesis is that, thus authorized, he must not commit murder in violation of the rules and customs of war. To such conduct his authority does not extend and while it may, for purposes of reparation in damages, be imputed to the state, this does not relieve him from such penal visitation as the usages of nations warrant. Nor indeed could he, more than a criminal of lesser degree, if special authority to him so to proceed were granted, depend upon the maxim *respondeat superior,* a maxim in this sense unknown to any code of criminal justice.

As here the accused is by treaty to be surrendered for trial, obviously the state of which he was sovereign seems to have accepted and acted on the distinction adverted to; and though this compact may have been induced *vire majore,* a treaty is not to be thus impugned, at least while *vis major* still rests with the party requiring its enforcement.

As to prosecuting a sovereign for waging an unjust war, M. Vattel, the John Marshall of writers upon international law, clearly states the objection to any such effort thus: "The first rule of that law (i. e., the voluntary law of nations), respecting the subject under consideration, is that *regular war, as to its effects, is to be accounted just on both sides.* * * * It is even impossible to point out any other rule of conduct between nations, since they acknowledge no superior judge." [2]

As to the responsibility of kings and emperors to criminal visitation by hostile powers, judicially pronounced by courts constituted by such belligerents after war, it may be well to consider first how the matter stands as to the lesser agents of a defeated state; and then to inquire whether and to what extent the fact,

[2] VATTEL, LAW OF NATIONS, p. 382.

that an individual thus accused is or was a reigning sovereign, is in the nature of a good plea, either in abatement, to the jurisdiction or in bar of attempted prosecution. It would seem that this government is committed quite definitely on this subject.

In 1865, immediately after the close of the Civil War, Henry Wirz was tried by a special military commission, constituted by the President and convened in Washington August 23rd of that year. He had been a captain in the Confederate service and commandant of the prison camp at Andersonville, Georgia, maintained by the Confederacy.

The charges, omitting the specifications, were in substance as follows:

Charge I: Maliciously conspiring, with certain named persons and others unknown, to injure the health and destroy the lives of soldiers in the military service of the United States, prisoners of war within the lines of the Confederacy, etc., in violation of the laws and customs of war.

Charge II: Murder in violation of the laws and customs of war.

The defendant pleaded in abatement and to the jurisdiction the terms of the convention between General Sherman of the Federal forces and General Johnston of the Confederacy, by which the latter surrendered his forces with an express stipulation that all officers and men complying with its conditions would "be permitted to return to their homes not to be disturbed by the United States authorities so long as they observe their obligation and the law in force where they may reside."

The defendant averred that he was then an officer of the Confederacy and included in the terms of that convention, that its terms had been complied with, and he had been at all times ready and willing to comply therewith; also that by this surrender he fell into the hands of the United States forces. He further pleaded safe conduct accorded to him by an officer on the staff of a Federal Brevet Major General if he would proceed to the latter's headquarters to furnish such verbal information as might be desired, whereas when he arrived at such headquarters he was seized, put in close confinement and sent to Washington, and

thereafter held pursuant to the capture so made. He accordingly prayed to be released, and denied the jurisdiction of the commission to try him for any offense whatever and the charges and specifications exhibited against him.

He denied the jurisdiction of the commission to try him on the following grounds:

(1) That the tribunal was unauthorized either by statute, military law, martial law or well established usage.

(2) That he was a naturalized citizen of the United States and was not and never had been in its land or naval forces; that the United States was then at peace both civilly and internationally; that the Civil War was ended and that no military jurisdiction or authority incident to a state of war could rightfully detain, try or punish him.

He further pleaded former jeopardy. He also moved to quash the charge and specifications for indefiniteness and uncertainty, and objected to them as insufficient because they did not charge any offense punishable under the law of war.

The judge advocate moved that the motion to quash and the pleas "except the plea to the jurisdiction be overruled, etc." After argument the court sustained the motion. The question of jurisdiction raised by defendant's specifications or pleas, numbered (1) and (2), being reserved, the defendant pleaded not quilty, was tried, found guilty on all charges as amended, and sentenced to be hanged; the findings and sentence of the court were approved by the President November 3, 1865, and the sentence executed the 10th of that month pursuant to executive order.

The judge advocate in the course of an elaborate argument on the law and the evidence remarked:

> "Before advancing further in the argument, let us define briefly the laws of war, whch it is alleged by the government in its indictment against this prisoner and his coconspirators, have been inhumanly and atrociously violated * * * as * * * it is insisted that no violation of the humane principles governing nations in war is shown. I must trespass upon the Court a moment before proceeding. In the forum of nations there is a higher law, a law paramount to any rule of action prescribed by either of them,

> and which cannot be abrogated or nullified by either. Whatever the peculiar forms or rights of this or that government, its subjects acquire no control or power other than is sanctioned by the great tribunal of nations. We turn then to the code international where the purest morals, the highest sense of Justice, the most exalted principles of ethics, are the corner-stones, that we may learn to be guided in our duties to this prisoner."

This and other similar statements demonstrate that the commission was, in this trial, attempting to proceed in conformity with the rules of international law.

This decision seems to establish in this country that an officer of a belligerent captured at the close of military operations or afterwards seized, may be tried by a military commission constituted by the President without legislative authority, for offenses in violation of the customs and rules of war committed within hostile lines and on the territory in control of the enemy, and that he may be sentenced and executed.

If this is sound, then no reason is perceived why German officers may not now be similarly tried by a joint commission constituted by the allied powers, or even where the offenses charged were alleged to be committed within the territory of one of the Allies, by the civil tribunals of that jurisdiction, without express treaty stipulation to that effect, unless it be that peace is itself an amnesty, as indicated by some jurists: a proposition apparently not recognized in the case of Wirz and eliminated here by express treaty provision.

In the course of his argument, the trial judge advocate, referring to defendant's claim to immunity as an officer in General Johnston's forces within the terms granted by General Sherman upon surrender of that army, made this observation:

> "The most that could with any plausibility be claimed, is that all acts of war committed by this prisoner as a belligerent, and coming within the usages of civilized warfare, may be considered as pardoned, but it cannot be admitted for one moment that anything short of a special pardon by the President of the United States, setting forth precisely the offenses pardoned, can give exemption from trial for acts in violation of the laws and customs of civilized warfare, es-

pecially when they involve crimes so enormous and atrocious as those charged upon the prisoner here arraigned."

The weight to be given to a judgment of such a tribunal approved by the President is clearly and forcibly stated by the Chief Justice of the United States, concurring with three Associate Justices, in the judgment of the court in the historic case, *Ex parte Milligan,* as follows: [3]

"The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for some time, when he himself became the victim of an abhorred conspiracy. It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings, therefore, had the fullest sanction of the executive department of the government. This sanction requires the most respectful and the most careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress."

The sentence was however annulled in that case under these tests, but upon grounds entirely inapplicable to the proceedings in the case of Wirz. Indeed as the main opinion by Mr. Justice Davis expressly pointed out, Milligan, the relator, had not been at any time in legal acts of hostility against the government and was not, therefore, a prisoner of war; and it would appear that this fact was regarded by the Court, as, in a measure, warranting its decision.

For the purpose of testing the position of the learned Secretary that the question of the guilt or innocence of the German Emperor was not a judicial but a political question, it is to be here noted that in at least two cases hereafter cited similar military tribunals have been held by the Supreme Court to be courts.

Probably one reason why the trial of Wirz was not remitted to the ordinary tribunals of the nation for the administration of penal justice may have been that the authorities felt, that under Article 6 of the first ten amendments, his trial must have

[3] 4 Wall. 2, 132.

then been held in the State of Georgia, so lately in rebellion, and of course by a jury there summoned, thus making conviction highly improbable. Moreover, the proceedings of military tribunals are usually much more rigorous and summary than those of the civil establishment, and I fear the determination on the part of the authorities to secure a conviction in this case *per fas aut nefas* was fixed and unalterable.

I say this without intending any reflection on the officers detailed for this commission, the President being Major General Lew Wallace, of Indiana, lawyer and author, widely and favorably known for his wonderful and graphic novel "Ben Hur;" and another member of the commission being Brigadier General Edward S. Bragg, of Wisconsin, one of the keenest minded lawyers I ever knew, a former commander of the "Iron Brigade" of the Army of the Potomac. As a delegate to the Democratic Convention of 1884 he added a phrase to literature when, speaking of Mr. Cleveland, he said, "We love him for the enemies he has made."

But had this cause been sent to the appropriate Federal District Court, whatever might have been the probable outcome, I affirm that, assuming its organic capacity to hear such cases it must be held consistently with the decision in the Milligan case, that such a tribunal, if martial law had not then existed in that territory, would have been competent to try him.

And so I say after the war is over, the civil tribunals of Belgium, Great Britain or France, exercising criminal jurisdiction, might within their respective territories try German officers for criminal violations of the rules of war there committed, unless by the organic law under which these tribunals are created their incompetence in this regard is declared. This may not be so while war is flagrant nor, in time of peace, as to members of the armed forces of the nation, the jurisdiction of whose tribunals of civil government is thus invoked, depending largely on the law limiting and regulating that jurisdiction. But no reason is perceived why, in the absence of such limitation and in a government intended and ordained to secure justice and maintain free institutions, this should not, in favor of the accused, as against the less merciful and more rigorous methods of military

power, be recognized as the law. I hold it should be, though I can but touch the subject most inadequately. In this connection the great argument of James A. Garfield in the Milligan case merits careful consideration, as does the history of the Earl of Lancaster's case referred to by him.

However, I am not closely concerned with this. I hold that for such offenses as those alleged against German officers after peace, enemy officers falling into the hands of a victorious belligerent, are triable by its tribunals; and that to this proposition this country is committed by its course in the case of Wirz—although the result reached in that case was probably due to the passion of the hour, when there was a tremendous pressure for such a result, which, as so often happens, neither the court nor the high executive officers of the government were strong enough to resist. But that a court reaches an erroneous conclusion is no impeachment of its jurisdiction or power to hear and determine. A court, having authority to hear and decide, has jurisdiction to decide wrong as well as right.

The question which I now wish to discuss is whether, assuming that such a jurisdiction exists, it extends so far as to embrace a sovereign charged with such crimes, using the term sovereign in its popular sense as indicating a natural person.

In this connection the learned Secretary makes an observation in which, with deference, I feel sure he does not correctly represent the sentiments of his countrymen. After saying that there were three charges which could be urged against the German Emperor: that he was responsible for the war, for the violation of the neutrality of Belgium, and chargeable with the flagrant violations of the laws and customs of war by the armed forces of Germany, he adds: "The first two charges were the ones which appealed most strongly to public opinion and aroused the bitterest indignation both in Europe and America."

In the first place let it be noted that, while sentiment in the North was almost universal that the Southern leaders, particularly Mr. Davis, were responsible for the War between the States, for which they were denounced in violent and unmeasured terms, not one of them was ever brought to trial on any such charge. The only victim of this wild cry for vengeance

was the unfortunate Wirz, on the charge of murder in violation of the rules and customs of war as well as the conspiracy charge already stated. This in a measure illustrates the state of the public mind under circumstances then existing, with reference to the two general classes of offenses referred to by the Secretary.

The first and second were indeed grave offenses against the moral law, perhaps really against the law of nations, and fraught with the most serious consequences to humanity. But the extent to which the imperial offender was responsible for them was involved in endless discussions in white books, blue books and other books, diplomatic records, dispatches and other similar documents, the study of which afforded opportunity for protracted and inconclusive debate, and to which but a limited class of our people were sufficiently accustomed to be either competent or altogether confident.

Moreover, many of our publicists and many excellent people of character and intelligence have always insisted that our wars with Mexico and with Spain were brutal aggressions on weak and helpless nations. Hence, everyone could understand how, under strong popular pressure and natural apprehensions due to apparent preparation for conflict by formidable foes, even a just and conscientious prince might be hurried into an indefensible and unjust war, and thus committed, might feel constrained, as a military measure, to disregard the territorial and sovereign rights of a little nation, whose low-lying and accessible fields had been for centuries the battle ground of Europe.

There was at least one distinguished citizen of the Great Republic who did not seem to participate in the "bitterest indignation" referred to by the learned Secretary. Speaking after the war had been flagrant for over four months and when the violation of the neutrality of Belgium was an accomplished fact, the President, in his annual message to the Congress, delivered December 8th, 1914, after referring to certain measures for national defense which he deemed adequate, said:

> "More than this, proposed at this time, permit me to say, would mean merely that we had lost our self-possession, that we had been thrown off our balance by war with which we have nothing to do, whose causes cannot touch us, whose very

> existence affords us opportunities of friendship and disinterested service which should make us ashamed of any thought of hostility or fearful preparation for trouble."

Thousands, perhaps even millions of our people, sympathized with this utterance. I venture, however, to say, very respectfully, that these sentiments were not altogether shared by the writer.

Let me now indicate what some of the incidents were which stirred the righteous indignation of the American people against their perpetrators and stimulated the feeling, quite universal at the time these outrages were reported, that those responsible for them, however high their rank, merited and ought to be visited with the severest punishment.

On the 7th of May, 1915, a merchant vessel carrying thousands of passengers from New York to Liverpool was deliberately sunk by torpedoes from a German submarine off old Kinsale on the Irish Coast with the loss of 1198 lives. Of those thus meeting their death, 102 were our own citizens. This vessel, The Lusitania, was unarmed and her destruction in this manner, whether or not she carried contraband, was as black an act of piracy as can be found recorded in the annals of the sea. Here was a clear case of murder in violation of the rules and customs of war. Those responsible should answer for it.

The story of frightfulness, shooting aged and helpless noncombatants, every kind of outrage and infamy against women, children and innocent babes, all with the connivance, sometimes with the active participation, or by the command, of commissioned officers of the German army, is too recent and too familiar to require prolonged rehearsal.

Every officer, however high his rank, responsible for such sickening barbarities, on principles acted on and approved by this government, is liable to trial and, on conviction, to punishment by death. Indeed nothing charged or proved against the wretched Wirz was at all comparable to these acts of savage and beastly barbarity, so foul and inhuman that, as men, we feel humiliated to think our fellows could be capable of such frightful enormities.

The conclusion of Lord Bryce's Commission as to how far these outrages in Belgium are to be attributed to the German High Command is thus stated:

"The explanation seems to be that these excesses were committed—in some cases ordered, in others allowed—on a system and in pursuance of a set purpose. That purpose was to strike terror into the civil population and dishearten the Belgium troops, so as to crush down resistance and extinguish the very spirit of self-defense."

It is not likely that those who criticise this report as partisan and unjust will make much impression on those of our people familiar with the long, distinguished and honorable career of that eminent writer, statesman and publicist. And lest some of those weighty statesmen in our public life, who seem to suppose Americans hate England and that, therefore, all that is necessary to court popularity here is to assail that mighty nation to which we are bound by so many indestructible ties, question the authenticity of his report because he is an Englishman, I hasten to warn them that, like many other great Englishmen, Lord Bryce is an Irishman.

Now it is not necessary to say that the German Emperor is responsible for these crimes to demonstrate that he is triable. My contention is that as he was in supreme command of the German forces on land, sea and air, he is clearly responsible for the murders in violation of the rules and customs of war, committed in air and naval raids on unfortified places and upon civilian and noncombatant nationals of the allied countries; *a fortiori* is he triable, unless his sovereign character confers immunity. He is clearly triable for these atrocities committed by his armies, if they were incident to the policy of frightfulness, deliberately pursued by the German High Command; and this his relation thereto certainly establishes probable cause to believe. Such liability should be enforced by proceedings essentially judicial, both in form and substance. It is also submitted, with deference, that the learned Secretary entirely fails to establish the contrary in the article referred to, and that the Commission on Responsibilities so far as it differed with our American representatives was clearly right, except that it did not go far enough and act on the law as heretofore established by this country.

Let it be noted that in at least two cases the Supreme Court

of the United States has decided that courts-martial are courts and exercise judicial power.[4] No reason is perceived why this is not equally true of military commissions. Nor is there any basis for the suggestion that after war, those guilty or charged with murder in violation of the laws and customs of war, seized by a victorious belligerent, have any sound basis for complaint if their trial be remitted to the civil tribunals having criminal jurisdiction in the territory where such crmes were committed. If there is no precedent for this, it might well be established. Neither the common nor international law is static; both are progressive, and grow, and develop. But all this is technical and narrow.

What one nation may do in this way, two or more may do. Venue is unimportant in such matters. Whether a trial be before a court, or a special civil or military commission be constituted, is a mere detail, dependent on the law of the victorious state or states. Such trials may be and have been held, and the only question is, may a personal sovereign, a king or an emperor, in a proper case, be thus tried?

International law may properly be referred to for the purpose of ascertaining whether such an offense has been committed. It is not concerned with the establishment of the tribunal for such trial nor the details and procedure, so long as in all such matters the essential principles of natural justice are regarded.

It is not my purpose to enter upon any extended and exhaustive examination of authorities on this subject. It would be a profitless task and lead to no valuable result. Indeed the learned Secretary has, it seems to me, so fully illustrated the truth of this observation by the singular conclusion he draws from Chief Justice Marshall's decision, that it requires no further demonstration.

Precedents in this field are rare. However, I wish to call attention to the comment of the great and most judicial historian of English constitutional law. Referring to the trial and execution of Charles I, Henry Hallam says:

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[4] Runkle *v.* United States, 122 U. S. 543; Grafton *v.* United States, 206 U. S. 333.

"The execution of Charles I has been mentioned in later ages by a few with unlimited praise—by some with faint and ambiguous censure—by most with vehement reprobation. My own judgment will possibly be anticipated by the reader of the preceding pages. I shall certainly not rest it on the imaginary sacredness and divine origin of royalty, nor even on the irresponsibility with which the law of almost every country invests the person of its sovereign.

"Far be it from me to contend that no cases may be conceived, that no instances may be found in history, wherein the sympathy of mankind and the sound principles of political justice would approve a public judicial sentence as the due reward of tyranny and perfidiousness. But we may confidently deny that Charles I was thus to be singled out as a warning to tyrants. His offenses were not, in the worst interpretation, of that atrocious character which calls down the vengeance of insulted humanity, regardless of positive law."

Will any one dare say this for the imperial offender of Germany if the infamies I have but lightly touched are justly laid at his door? Nor does the sovereign irresponsibility, which was expressly conferred by the constitution of his country, extend beyond its borders, nor confer any immunity as against belligerent states on whose soil and against whose nationals he is charged with such gross outrages against the laws of God and the laws of man. That such immunity ought not to protect such an infamous miscreant, even in his own country, is laid down by Hallam in the extract just quoted.

It appears from the address of the learned Secretary that certain of the fifteen members of the Commission on Responsibilities were at first determined to bring the German Emperor to trial on all three charges already mentioned, namely: 1. Being the author of the war; 2. Violating the neutrality of Belgium and Luxemburg; 3. Violating the laws and customs of war. In the end he tells us it was unanimously agreed that no such report could be made as to the first two charges. The commission, however, did report over the objections of our representatives as to the third charge as follows:

"All persons belonging to enemy countries, however high their positions may have been, without distinction of rank, in-

cluding Chiefs of States, who have been guilty of offenses against the laws and customs of war, or the laws of humanity, are liable to criminal prosecution."

The Secretary quotes from the memorandum in support of the dissent of our representatives as follows:

"The American representatives are unable to agree with this conclusion, in so far as it subjects to criminal, and, therefore, to legal prosecution, persons accused of offenses against 'the laws of humanity,' and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to *municipal or international law,* for which no precedents are to be found in the modern practice of nations.

"Omitting for the present the question of criminal liability for offenses against the laws of humanity, which will be considered in connection with the law to be administered in the national tribunals and the High Court, whose constitution is recommended by the Commission, and likewise, reserving for discussion in connection with the High Court the question of the liability of a Chief of State to criminal prosecution, a reference may be properly made in this place to the masterly and hitherto unanswered opinion of Chief Justice Marshall, in the case of the Schooner Exchange *v.* McFadden and Others (7 Cranch, 116), decided by the Supreme Court of the United States in 1812, in which the reasons are given for the exemption of the sovereign and of the sovereign agent of a State from judicial process.

"This does not mean that the head of the State, whether he be called emperor, king or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial, but to the *political authority of his country.* His act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries a chief executive, thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.

"But the law to which the head of the State is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsi-

ble is the tribunal of his country, not of a foreign country or group of countries; and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act.

"* * * The American representatives also believe that the above observations apply to liability of the head of a State for violations of positive law in the strict and legal sense of the term. They are not intended to apply to what may be called political offenses and to political sanctions.

"These are matters for statesmen, not for judges, and it is for them to determine whether or not the violators of the treaties guaranteeing the neutrality of Belgium and of Luxemburg should be subjected to a political sanction."

Although the learned Secretary directs especial attention to the last sentence, I confess my entire inability to appreciate its relation to the subject in hand any more than I can understand why Luxemburg is brought in, except in some way to minimize the infamies perpetrated by the Germans in Belgium. And I must confess, with deference, to a certain sense of humiliation that the representatives of this country did not, in this entire matter, take a more rugged and virile attitude, and one more worthy of our national spirit and character.

The Commission having unanimously decided that no proceedings ought to be brought in respect of violations of the neutrality of Belgium, I fail to see the relevancy of harking back to this subject in a dissent from a report favoring proceedings to punish violations of the usages of war. As to these, where individuals were involved, the learned Secretary tells us the report recommended the creation of a "high international tribunal to try such persons as were not apprehended and tried before national Courts of the Allied and Associated Powers," etc., to which also our representatives seem to have objected, as earlier in the discussions they indicated that such proceedings should, in their opinion, be brought before military tribunals.

They finally seem to have "conceded that possible expediency of an international Commission to pass upon the military crimes affecting the nationals of more than one country, etc." though it is difficult to see what substantial distinction there is between

such a tribunal and mixed courts-martial, which the Secretary suggests.

The Supreme Council took the matter up and the result was Article 227 of the Treaty in part as follows:

> "The Allied and associated powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties.
>
> "A special tribunal will be constituted to try the accused, thereby assuring him the guaranties essential to the rights of defense. It will be composed of five judges, one appointed by each of the following powers—namely, The United States of America, Great Britain, France, Italy and Japan."

The article also declares that it will be the duty of the tribunal to "fix the punishment which it considers should be imposed."

This would seem to be a most vapid and meaningless performance. Unless exempted by his sovereign character, if he was to be tried for atrocities in Belgium, France and elsewhere, committed by his armed forces on land and sea, and in the air, the imperial offender should have been tried like those of lesser rank. There is, and should be, no divine right of kings to murder innocent noncombatants, women and children; and to commit or cause to be committed every infamy known to savages and then to go unpunished because kings have done so in the past, and because no exact precedent can be found for all the details of such a trial and sentence. Such arraignment of a sovereign should be, in my judgment, wholly judicial, both in form and substance, and not merely in form, as the Secretary tells us this is to be.

This address leaves the impression on the mind of an American lawyer that our representatives on the Commission on Responsibilities at every turn endeavored to hamper and thwart the efforts of those seeking to bring the Emperor to trial and finally to put the proposed proceedings into such shape that they should be fruitless and ineffectual. This statement may be somewhat incorrect, though the learned Secretary, as I understand his ad-

dress, avows the purpose of our representatives to be to prevent such a trial.

But the question is, can such claim of immunity be maintained logically and intelligently on the considerations suggested and the authority cited by the learned Secretary.

It will be noted that he cites but one—"one but a lion;" the opinion of John Marshall in Schooner Exchange *v.* McFaddon.[5] Let us see what this case was and what the Chief Justice says on the point in question. For in his opinion, cited and followed with the most profound respect on both sides of the Atlantic, is all there is to the doctrine of immunity of a sovereign from the laws of a foreign state set down with the exact, luminous, powerful and convincing reasoning which marks the opinions of the greatest judge in history. In that case the facts were these. The Schooner Exchange, a public armed vessel of the Empire of France, commissioned by and in the service of the Emperor Napoleon, the ruler of that country, lay in the port of Philadelphia. Our government was at peace with France. This vessel, having encountered great stress of weather upon the high seas, was compelled to enter the port in question, not voluntarily, but from necessity, for refreshment and repairs. Having procured such, and having conformed in all things to the law of nations and the laws of the United States, she was about to depart, when, August 24th, 1811, she was seized on process issued under a libel filed in the District Court of the United States. This libel set forth that the libellants were her sole owners on October 27th, 1809, when she sailed from Baltimore bound for St. Sebastain, a port of Spain; that, while pursuing her voyage, she was on December 30th, 1810, forcibly seized by persons acting under the decrees of the French Emperor and disposed of by them in violation of the rights of libellants; that no sentence of condemnation had been pronounced against her by any court of competent jurisdiction, and that the property of the libellants in her remained unchanged.

The attorney for the United States for that district appeared at the instance of the Executive and filed a suggestion, inform-

[5] 7 Cranch 116.

ing the court as to the character of the vessel—a public armed vessel of a friendly power,—and the circumstances under which she entered the port of Philadelphia; and that if she was ever the property of libellants, such property was divested and became vested in the Emperor within a port of his Empire or of a country occupied by his arms out of the jurisdiction of the United States, according to the decrees and laws of France. Accordingly he moved the dismissal of the proceedings and the release of the vessel.

The District Court sustained this motion. The Circuit Court on appeal reversed that judgment, and from that judgment of reversal the district attorney appealed to the Supreme Court, which reversed the judgment of the Circuit Court, and held that the vessel must be released and the libel dismissed. The Chief Justice announced the opinion of the Court after a full discussion of the subject as follows:[6]

> "If the preceding reasoning be correct, The Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, *under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner,* she should be exempt from the jurisdiction of the country." (Italics supplied.)

He had previously declared in the clearest terms that the jurisdiction of a nation within its own territory was paramount. On this point he said:

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> "All exceptions, therefore, to the full and complete power of

[6] 7 Cranch 116, 147.

> a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> "This consent may either be expressed or implied."

Finding an implication of such consent from the usages and customs of nations as to armed vessels of a sovereign temporarily and necessarily within the ports of a friendly nation, upon no hostile errand, and demeaning themselves "in a friendly manner" he announced the decision in the language first quoted.

Yet this decision is cited by the learned Secretary to establish the proposition that the German Emperor is entitled to such exemption from the territorial jurisdiction of that country as by the comity of nations is accorded to a friendly sovereign, his ambassadors or public armed vessels in the foreign territory of a nation with which he is at peace, while these demean themselves in a "friendly manner," by which comity the consent of such nation to the presence of such sovereign and these, his agencies, is to be presumed. And this is in spite of the fact that the German Emperor, having with his troops invaded Belgium against the protest of her sovereign and the desperate resistance of her arms, carrying the sword in one hand and the torch in the other, not only waging war upon her, but slaying, pillaging, burning and ravaging on every hand.

With the highest respect for the learned Secretary and his legal advisers, I must say there is something so grotesque, and in view of the terrible tragedies thus recalled to our minds, so ghastly in this suggestion, that I am quite unable to understand how it could be advanced before a representative body of American lawyers. I cannot seriously discuss such a proposition.

We stand at the dawn of a newer day. The old order changeth. No one is above the law, neither king nor kaiser. Either may make war and kill and slay, *secundum belli legem.* Let it be understood that beyond that none may go, from the humblest private to those highest in rank, even the sovereign himself.

There is an instinct in the heart of every just-minded American that tells him there must be something wrong with a theory under which the poor wretch, who sank the Lusitania under orders, for the disobedience of which he would have been summarily shot,

may, if captured, be put on trial for his offense; but that the superior who gave those orders must go free because of his kingly and imperial character; because, forsooth, the king can do no wrong. We settled this question the other way in 1776. It is too late to disturb that settlement. The equality of all men before the law includes king and commoner alike.

Let the kings and emperors welcome this conclusion. When it is recognized that they too respect and obey the law, they will reign more securely; yes, they will live longer. As for the unfortunate and miserable creature who, having with resounding bombast and insane declamation, fretted his little hour upon the stage, in his country's dire need and sore distress has skulked away leaving her naked to her enemies, let us not seek to wreak any merely human revenges upon him—"Vengeance is mine, I will repay, saith the Lord." The severest penalty that can be visited upon him is long life and an unimpaired memory.

It is now nearly two years, at a time when his victorious legions stood unchecked at the Marne, and Paris seemed almost within his grasp, that I concluded some public observations upon the ill-timed suggestions as to peace, emanating from those high in place and power in England, with this sentence:

> "It is time for the Imperial miscreant of Germany to understand that he cannot forever delay the immutable decrees of destiny, and that when the curtain falls upon this awful drama, it will be rung down forever on him and his dynasty as well as upon the ruins of the country he has destroyed."

All this has happened. What comes to him further is of small consequence.

But it is, I believe, important that the fiction of kingly irresponsibility shall be finally and authoritatively destroyed; and I could have wished that on this great occasion the representatives of my country had sounded a higher, clearer, sterner note more accordant with American traditions and the genius and institutions of a free people. I am unwilling to permit the position taken by the learned Secretary to pass wholly unchallenged. For his conceded attainments in the field of international law, his extended experience in international controversy, his great amia-

bility of character and his high official position, all combine to give great and just weight to his considered opinions in this domain of jurisprudence. Yet no member of the American Bar should surrender his convictions on such vital questions, even to authority so respectable.

And so, crudely and imperfectly, as I well understand, I have, amidst the engrossing and laborious activities of an arduous profession, set down these, my own views, which are, I fully believe, largely shared not only by the profession, but by our countrymen as well.

S. S. Gregory.

CHICAGO, ILL.